No. 88-2123

# In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

*v.*

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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## MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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### INTRODUCTION

On June 28, 1989, the Department of the Treasury, Internal Revenue Service ("IRS") petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The opinion of the court of appeals is reported at 862 F.2d 880, and is appended to the petition (Pet. App. 1a-9a).

It is the position of the respondent Federal Labor Relations Authority ("Authority") that the D.C. Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of the fundamental issue in this case, whether the Statute's declaration that a subject matter is nonnegotiable also

serves to prevent grievances over management's exercise of that nonnegotiable subject matter. This division causes uncertainty for all participants in federal government labor-management relations. Moreover, resolution of this issue is of considerable importance, not only because it involves the subject matter of contracting-out, but because on a wide range of issues (such as employee discipline and promotions) it potentially affects access to the negotiated grievance procedure, a congressionally-mandated cornerstone in the operation of Title VII of the Civil Service Reform Act of 1978. Accordingly, the Authority does not oppose granting the present petition.

## STATEMENT

### A. Background

#### 1. The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute ("the Statute"), 5 U.S.C. 7101-7135. Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority"), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97.



Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, Government-wide rule or regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B); *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 892 (D.C. Cir. 1982). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal is within the duty to bargain established by the Statute. 5 U.S.C.

7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891. If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The Statute requires that, at the request of either party, the product of collective bargaining negotiations be reduced to a written collective bargaining agreement. 5 U.S.C. 7103(a)(12), 7114(b)(5). Such a collective bargaining agreement must "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance' ";[1] Section 7121 lists only

[1] H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 686 (Comm. Print No. 96-7) (*Legis. Hist.*).



five subject matters that are statutorily excluded from the permissible scope of the negotiated grievance procedure.[2]

**2. The EEOC Litigation, Which Preceded the Instant Case**

a. In *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the Authority held negotiable the following proposal:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.[3]

In finding the proposal negotiable, the Authority determined that the proposal did not impair EEOC's right to make contracting-out determinations because the proposal did not impose any substantive limitations upon manage-

[2] The five subject matters excluded are:

> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
> (2) retirement, life insurance, or health insurance;
> (3) a suspension or removal under section 7532 of this title;
> (4) any examination, certification, or appointment; or
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. 7121(c). See, *e.g.*, *The Veterans Administration Medical Center, Togus, Maine and AFGE, Local 2610*, 17 F.L.R.A. 963 (1985); *Federal Aviation Administration, Department of Transportation, Tampa, Florida and Federal Aviation Science and Technological Association, NAGE, Tampa, Florida*, 8 F.L.R.A. 532 (1982). Parties can, in negotiations, agree to exclude additional matters. 5 U.S.C. 7121(a)(2).

[3] OMB Circular A-76 ("the Circular") applies to Executive agencies and provides direction for agency decisions whether to contract-out to private enterprise for products and services the government needs. 44 Fed. Reg. 20556 (1979), as amended by 45 Fed. Reg. 69322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37110 (1983); 50 Fed. Reg. 32812 (1985).

ment's right to make contracting-out determinations apart from those already existing (10 F.L.R.A. at 3).[4] Thus, because the proposal simply obligated EEOC to act in accordance with whatever laws and regulations may be extant at the time EEOC exercises its right to contract-out, the Authority held that the proposal did not narrow the scope of the discretion the Statute reserved exclusively to EEOC (*ibid.*).

The Authority also rejected EEOC's claim that because the proposal would subject grievances concerning the application of the Circular to the negotiated grievance procedure, the proposal conflicted with the Circular and was thus nonnegotiable (10 F.L.R.A. at 4). The Authority, quoting *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981), stated that Government-wide "regulations * * * may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under section 7121 of the Statute" (*ibid.*). In this regard, the Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining (*ibid.*). Accordingly, the Authority concluded, even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in decision).

[4] The Authority distinguished this proposal from one it had found nonnegotiable in *NFFE, Local 1167 and Department of the Air Force Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom. NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982). In that case the proposal would have required the agency to comply with the specific terms of OMB Circular A-76 regardless of whether the Circular were to be revised or rescinded (10 F.L.R.A. at 4). By locking management into observing specific terms in the Circular, the Authority stated in that case, the proposal impermissibly would have imposed its own limitations on management's right (*ibid.*).



Finally, the Authority noted that, to the extent EEOC had argued that the proposal would change the scope and coverage of the parties' negotiated grievance procedure, EEOC had misinterpreted the legal effect of the proposal (10 F.L.R.A. at 5). The Authority stated that even in the absence of the proposed contract provision, under the Statute disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless a particular grievance is inconsistent with law (see *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669, 673 (1981)) or unless the parties exclude such grievances through negotiations (see, *e.g., AFGE, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 F.L.R.A. 320 (1980)) (*ibid.*).

b. The D.C. Circuit, in an opinion by Judge Tamm (Senior Judge MacKinnon, dissenting), upheld the Authority's decision and enforced the Authority's bargaining order. *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984). At the outset, the court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), stated that "the Authority is entitled to 'considerable deference' when interpreting and applying the [Statute's] provisions to specific situations" (744 F.2d at 847).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations, and that any bargaining proposal regarding contracting-out would restrict that authority (744 F.2d at 848-849). The

court found that the Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" (744 F.2d at 848). Since the bargaining proposal essentially echoed the statutory requirement that contracting-out determinations be made in accordance with applicable laws, the court agreed with the Authority's conclusion that the proposal, which did not itself establish any substantive criteria guiding management's contracting-out determinations, did not affect the scope of that authority reserved to management by the Statute (*ibid.*).

Second, the court rejected EEOC's argument that adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure (744 F.2d at 849-851). The court noted that this argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal (744 F.2d at 849). Such an assumption, the court found, was "contrary to the text" of the Statute, which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" (*ibid.*). In this regard, the court noted that under the Statute, "[o]nly five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism" (744 F.2d at 849-850; footnote omitted).[5]

[5] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of grievable matters (744 F.2d at 851). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement" (744 F.2d at 851 n.20, citing 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924).



Finally, the court rejected EEOC's argument that the language of the Circular (that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself) renders the proposal nonnegotiable (744 F.2d at 851-852). First, the court noted that the proposal is not inconsistent with the Circular because the proposal does not "create" a new appeal right (744 F.2d at 851). Rather, as the court had already determined, the right to file grievances regarding contracting-out decisions is created by the Statute, not by the proposal (*ibid.*). Second, and "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (*ibid.*). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress" (744 F.2d at 851-852, quoting *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949)).

c. This Court granted EEOC's petition for a writ of certiorari (472 U.S. 1026 (1985)). After briefing and argument, however, the Court dismissed the writ as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. 19 (1986). The Court found that three of the arguments which were "the linchpins of the EEOC's brief" before the Court (476 U.S. at 23) were not raised by EEOC before either the Authority or the court of appeals. Specifically, the Court noted EEOC's contention that Circular A-76 was not an "applicable law" under the management rights clause of the Statute (5 U.S.C. 7106), thus making compliance with the Circular an inappropriate intrusion on management's re-

served rights (476 U.S. at 22). Second, the Court noted EEOC's assertion that an alleged violation of the Circular would not be grievable absent the proposal because the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of "grievance" (*ibid.*). Third, the Court noted EEOC's suggestion that the Circular *is* a "Government-wide rule or regulation" for purposes of 5 U.S.C. 7117(a)(1), and that Section 7117(a)(1) excluded such rules or regulations from the scope of the duty to bargain (*ibid.*; emphasis in decision).

The Court found that 5 U.S.C. 7123(c) prevented the Court from considering each of these arguments because they were improperly before the Court in the first instance (476 U.S. at 23). Under these circumstances, the Court concluded that several central issues on which resolution of the case may well turn cannot be reached or resolved (476 U.S. at 24). Accordingly, the Court dismissed the writ as improvidently granted (*ibid.*).

**B. Proceedings in the Present Case**

**1. The Authority's Decision**

This case arose in September 1986 when, in the course of collective bargaining negotiations with the National Treasury Employees Union ("NTEU" or the "union"), the Internal Revenue Service objected to three bargaining proposals relating to contracting-out of bargaining unit work. In response, the union asked the Authority, pursuant to 5 U.S.C. 7117(c), to review the agency's allegation of nonnegotiability concerning two of the proposals to which the agency had objected. The proposal which is the subject of IRS' instant certiorari petition stated as follows (Pet. App. 10a):

> The Internal Appeals Procedure [for agency contracting-out decisions made pursuant to OMB Circular A-76] shall be the parties' grievance and arbitration provisions of the Master Agreements.



The Authority found that the proposal would allow the union to grieve matters arising out of IRS' decision to contract-out, where those matters concern an alleged failure to comply with applicable laws, regulations and established procedural processes (Pet. App. 14a). In assessing the negotiability of this proposal, the Authority first noted that the proposal was not rendered outside the duty to bargain by an inconsistency with a Government-wide rule or regulation (Pet. App. 11a-12a). Citing *AFGE, Local 225 and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 F.L.R.A. 417, 420 (1985), the Authority stated that it had previously found OMB Circular A-76 to be a Government-wide rule or regulation within the meaning of Section 7117(a)(1) of the Statute (Pet. App. 11a-12a). Further, as to whether the proposal was inconsistent with the Circular, the Authority noted, as it had in *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), that the right to file grievances concerning contracting-out decisions which affect conditions of employment is created by the Statute; and that the Circular cannot limit the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure (Pet. App. 12a). Accordingly, the Authority rejected IRS' contention that the proposal was nonnegotiable because it was inconsistent with a Government-wide regulation (*ibid.*).

The Authority next examined IRS' three reasons for contending that the proposal was nonnegotiable because the proposal assumes incorrectly that matters pertaining to contracting-out under OMB Circular A-76 are subject to the negotiated grievance procedure (Pet. App. 12a-15a).

As to IRS' first assertion, that there can be no "grievance" within the meaning of Section 7103(a)(9) of the Statute on a violation, misinterpretation or misapplication of the Circular since the Circular is not a law, rule, or regulation, the Authority responded by noting that the Authority already had found to the contrary. The Authority had previously held that the Circular is a Government-wide rule or regulation within the meaning of the Statute, and that grievances concerning its interpretation and application do fall within the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure (Pet. App. 12a-13a).

IRS also claimed that even if OMB Circular A-76 is a Government-wide regulation, contracting-out does not concern employees' conditions of employment and therefore cannot be a matter which is subject to the grievance procedure (Pet. App. 13a). The Authority rejected this argument, stating that the contracting-out determination has the potential for affecting employees' working conditions even to the extent of costing employees their jobs (*ibid.*). In addition, the Authority stated that the potential loss of employment due to a decision to contract-out bargaining unit work, or a decision to reassign or reallocate the duties and functions of bargaining unit positions, at a minimum, affects the conditions of employment of the employees who perform those duties and functions (*ibid.*).

Finally, as to IRS' contention that the exercise of management's right to contract-out cannot be subject to the grievance procedure, the Authority noted that this argument too had been rejected by the Authority in finding a similar proposal negotiable in *EEOC*, 10 F.L.R.A. 3 (Pet. App. 13a). The Authority noted that it had concluded that such a proposal itself would not establish any



particular substantive limitation on management in the exercise of that right (Pet. App. 13a-14a).

The Authority summarized its negotiability finding with respect to the proposal by noting that the Statute requires grievance procedures negotiated under Section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure, unless the parties exclude them through bargaining (Pet. App. 14a). Consequently, the Authority stated, a proposal allowing the union to grieve matters arising from an agency's contracting-out determination on the basis that they are not in compliance with law and regulation would not change the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure. Such disputes, involving conditions of employment arising from the application of OMB Circular A-76, would be covered by the negotiated grievance procedure even in the absence of such a contractual provision (*ibid.*). Moreover, the Authority noted, such grievances require nothing that is not required by Section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made "in accordance with applicable laws" (Pet. App. 15a). Accordingly, the Authority found the proposal within the duty to bargain (*ibid.*).

**2. The Court of Appeals' Decision in the Instant Case**

IRS petitioned the D.C. Circuit to review the Authority's decision. IRS argued generally that any proposal which would subject the IRS' contracting-out decisions under A-76 to arbitral review is nonnegotiable because it would provide for arbitral review of an exercise of a nonnegotiable management right. In addition, IRS advanced two of the three particular arguments which had appeared for the first time in the EEOC brief before

this Court in *EEOC* v. *FLRA*, 476 U.S. 19 (1986) (No. 84-1728). Specifically, IRS argued that the proposal was nonnegotiable because OMB Circular A-76 was not a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii), the violation of which gives rise to a grievance; and that OMB Circular A-76 was not an "applicable law[]" that constrains management's contracting-out discretion within the meaning of 5 U.S.C. 7106(a)(2).[6]

The court of appeals (D.H. Ginsburg, J., dissenting) began its analysis in this case by returning to its holding in *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984) (Pet. App. 4a). The court noted that in *EEOC* it had found that a grievance alleging noncompliance with the Circular does not affect management's substantive authority, within the meaning of the language of the Statute, to contract-out (Pet. App. 5a, quoting *EEOC* v. *FLRA*, 744 F.2d at

[6] In its petition for a writ of certiorari in this case, IRS states that it also challenged the Authority's ruling on the basis of Section 7117(a)(1), citing its appellate court brief at 27 n.20. IRS' reference would appear to be to the end of the footnote, which states: "(Of course, we disagree, respectfully, with [the D.C. Circuit's] statement in *EEOC*, 744 F.2d at 851, that a proposal that would subject contracting-out decisions under A-76 to grievance and arbitration is not inconsistent with the terms of the Circular)." IRS Br. 27 n.20. This argument, *i.e.*, that the proposal is nonnegotiable because it is inconsistent with the Circular, was raised before the Authority and the court of appeals in the *EEOC* litigation. A second argument based upon Section 7117(a)(1) that was not raised before the Authority or the court of appeals in the *EEOC* litigation was the contention that Section 7117(a)(1) bars negotiation not only over proposals which bring about an inconsistency with a Government-wide rule or regulation but over proposals which simply share the same subject matter as a Government-wide rule or regulation. See Opening Brief for EEOC at 46-47, *EEOC* v. *FLRA*, 476 U.S. 19 (1986) (No. 84-1728). This latter argument has not been raised before the Authority or the court of appeals in this case and remains barred from consideration in this Court by 5 U.S.C. 7123(c).



850-851). Rather, the court stated, the grievance provides a procedure for enforcing the Statute's requirement that contracting-out decisions be made in accordance with applicable laws (*ibid.*). Accordingly, the D.C. Circuit noted that in *EEOC* it had found that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause (*ibid.*).

After reexamining this holding in *EEOC*, the court below concluded that the *EEOC* court had been assuming that "the Circular was either an 'applicable law,' with which all contracting-out decisions must, by statute, accord, 5 U.S.C. § 7106(a)(2)(B), or it was a 'law, rule or regulation' a failure to comply with which would, again by statute, give rise to a grievance if it were to affect 'conditions of employment.' 5 U.S.C. § 7103(a)(9)(C)(ii)" (Pet. App. 5a). The court below then noted that this Court had dismissed, as improvidently granted, a writ of certiorari, issued upon EEOC's petition when EEOC attempted to argue that the Circular was none of the foregoing (Pet. App. 5a).

The court below concluded that these arguments, having now been raised in these proceedings, do not provide "an intellectually legitimate basis to distinguish *EEOC* from this case" (Pet. App. 5a). The court below stated that the new arguments "are merely that; they suggest alternative reasons why the 'management rights' provisions of Section 7106 should be read to preclude employee grievances with respect to an agency's decision to contract-out" (Pet. App. 5a-6a). This, the court stated, was expressly contrary to the holding of *EEOC* (Pet. App. 6a). Accordingly, the court affirmed the Authority's determination that the proposal is negotiable (Pet. App. 6a).

IRS filed with the court below a petition for rehearing with suggestion for rehearing en banc. On February 28, 1989, both the petition for rehearing and the suggestion for rehearing en banc were denied (Pet. App. 21a-23a). Judge D.H. Ginsburg, joined by Judges Williams and Sentelle, issued a concurring statement to the effect that, given this Court's apparent interest in this issue (*i.e.*, the Court's willingness to grant certiorari in *EEOC* v. *FLRA*, 472 U.S. 1026 (1985), at a time when there was no split in the circuits), it was not a sensible allocation of the resources of the court below to rehear the case en banc (Pet. App. 25a). The statement indicated that if this Court chose not to grant a new petition for a writ of certiorari, the judges were expressing no opinion as to whether they would be willing to grant rehearing in a subsequent case before the D.C. Circuit (*ibid.*). Judge Silberman also issued a short concurrence in which he stated that the court should be exceedingly reluctant to agree to an en banc rehearing with the then-existing two vacancies on the bench (Pet. App. 24a).

**THE AUTHORITY DOES NOT OPPOSE THE PETITION**

The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the decision conflicts with the panel decision of the Ninth Circuit in *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed, 476 U.S. 1110 (1986) and with the 6-5 en banc decision by the Fourth Circuit in *HHS* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988).[7]

[7] The court below does, however, mistakenly conclude that it was the new arguments (*i.e.*, the arguments not properly before the Court in *EEOC* v. *FLRA*, 476 U.S. 19) which persuaded the Ninth Circuit that the D.C. Circuit's *EEOC* decision was wrongly decided. The new arguments were not made to the Ninth Circuit (Ninth Circuit briefing was complete in January, and the case was argued in March, 1985; the new arguments did not begin to appear until the May, 1985 petition for a writ of certiorari in *EEOC* v. *FLRA*, 476 U.S. 19 (No. 84-1728)). Instead, the Ninth Circuit disagreed with the D.C. Circuit's resolution of the underlying issue in *EEOC* of whether the Statute's declaration that a subject matter is nonnegotiable also serves to prevent grievances over management's exercise of that authority.

It is disagreement over the permissible scope of the negotiated grievance procedure—and not the new arguments—which also controls the Fourth Circuit's decision in *HHS* v. *FLRA*, 844 F.2d 1087. While two of the new arguments were resolved by the Fourth Circuit (despite the fact that, as the dissent correctly shows (844 F.2d at 1102), these issues were—as in *EEOC* v. *FLRA*, 476 U.S. 19—not properly before the court), the resolution of these issues did not direct the Court's holding. As was the panel in the Ninth Circuit, the six-member majority of the Fourth Circuit is of the view that management's exercise of its reserved rights is not grievable (844 F.2d at 1090-1092), presumably regardless of whether the exercise of such rights is affected by an "applicable law[]" or whether a "law, rule, or regulation" was violated, misinterpreted or misapplied in that exercise.



Only in connection with contracting-out (of all the reserved management rights enumerated in the Statute) has it been argued to the courts, and been found by the Ninth and Fourth Circuits, that when the Statute declares a subject matter nonnegotiable it also makes a subsequent challenge to the manner in which the right was exercised nongrievable. The division among the circuits on this issue is an important one. Aside from the immediate question involving contracting-out, resolution of this issue potentially affects access to the negotiated grievance procedure on a wide range of what, heretofore, have been concededly grievable matters (*e.g.*, employee discipline, promotions).

Accordingly, the Authority does not oppose granting the present petition.[8]

Respectfully submitted.

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AUGUST 1989

[8] The Acting Solicitor General authorizes the filing of this memorandum by Respondent Federal Labor Relations Authority.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—244-982/62071